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BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Susan Bartizal for a Permit)	
to Construct a Boat Ramp and Remove Eight)	
Rocks and Place Along the Shore on the)	3-LM-92-786
Bed of the Fox River, City of Neenah,)	
Winnebago County, Wisconsin)	
Investigation on Motion of the Department of)	
Natural Resources of an Alleged Unlawful)	
Construction and Maintenance of a Structure on)	3-LM-92-787
the Bed of the Fox River, City of Neenah,)	
Winnebago County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND PERMITS

On July 24, 1992, Susan Bartizal applied to the Department of Natural Resources for a permit to construct a wooden boat ramp and remove bottom material from the Bed of the Fox River. Additionally, the staff of the Department of Natural Resources, Lake Michigan District, conducted field investigations and allege that the Bartizals have constructed and maintained a pier on the bed of the Fox River adjacent to their property in violation of secs. 30.12 and 30.13, Stats. The staff further allege that the structure interferes with the rights and interest of the public in the Fox River.

Pursuant to due notice, a combined hearing was held in Oshkosh, Wisconsin on March 1, 1996 and May 10, 1996, before Mark J. Kaiser, Administrative Law Judge. The parties filed written arguments after the hearing. The last submittal was received on June 19, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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APPLICABLE LAW

Section 30.13(1), Stats., provides:

A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

(a) The wharf or pier does not interfere with public rights in navigable waters.

(b) The wharf or pier does not interfere with rights of other riparian proprietors.

(c) The wharf or pier does not extend beyond any pierhead line which is established under sub. (3).

(d) The wharf or pier does not violate any ordinances enacted under sub. (2).

(e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

Section 30.13(4)(a), provides:

A wharf or pier which interferes with public rights in navigable waters constitutes an unlawful obstruction of navigable waters unless a permit is issued for the wharf or pier under s. 30.12 or unless authorization for the wharf or pier is expressly provided.

Sections 30.12(1) and (2), Stats., provide in relevant part:

(1) General prohibition. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established;

(2) Permits to place structures or deposits in navigable waters; generally. The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest.

Sec. NR 326.04(1), Wis. Adm. Code, provides in relevant part:

Except as provided in sub. (2) or (8), piers shall not extend into the water from the shoreline beyond the line of navigation or the length of the boat using the pier unless a need can be demonstrated by the riparian that boats using the pier require a greater depth of water.

Sec. NR 326.05, Wis. Adm. Code, provides in relevant part:

Riparians intending to construct ... piers not conforming to s. 326.04(1) ... shall apply for permits under s. 30.12(2), Stats.

FINDINGS OF FACT

1. Susan Bartizal and Fred Bartizal, M.D., (Bartizals or applicants) own real property located at 100 Grant Street, Neenah, Wisconsin, 54956. The property is located along the north bank of the Fox River. The legal description of the property is the SE 1/4, SE 1/4, Section 22, Township 20 North, Range 17 East, Village of Neenah, Winnebago County, Wisconsin. The Bartizals own approximately 200 feet of frontage along the Fox River.

2. By application dated July 24, 1992, the Bartizals applied for a permit to construct a boat ramp on the bed of Fox River. The proposed boat ramp is sixteen feet wide by twenty feet long with wood pile supports. In the same application, the Bartizals also sought a permit to remove eight rocks on the bed of the Fox River and place them along the shore of their property.

3. Construction of the proposed boat ramp will not materially impair navigation and will not be detrimental to the public interest in navigable waters upon compliance with the conditions in the permit.

4. The proposed boat ramp will not reduce the effective flood flow capacity of the Fox River.

5. The proposed boat ramp will not adversely affect water quality nor will it increase water pollution in the Fox River. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats., if the structure is built and maintained in accordance with this permit.

6. The applicants are financially capable of constructing, maintaining or removing the proposed boat ramp if it should be found in the public interest to do so.

7. The proposed removal of eight rocks from the bed of the Fox River will not materially impair navigation and is consistent with the public interest in the Fox River.

8. When employees of the Department of Natural Resources (Department) went to the Bartizal property to conduct an investigation for the application, they observed a pier constructed at the site. According to the Bartizals, the pier was constructed in 1988. The structure consists of a main pier approximately fifty foot long by five foot wide with two "L" extensions. The "L" extensions are connected to the main pier and are parallel to the shoreline. The "L" extensions are each approximately 24 feet long, one of the "L" extensions is approximately ten feet wide and the other one is approximately two feet wide.

The main pier is attached to a central platform approximately sixteen feet square in size. This central platform is connected to the shore. Two square platforms are attached to either side of the central platform. These side platforms are also each approximately sixteen feet square in size and connected to the shore. The side platforms are constructed approximately six inches lower than the central platform and main pier. At the time of the inspection, an umbrella table and chairs, resin bench, table and chairs, and webbed chaise lounges were on the platforms. A substantial portion of the platforms are constructed below the ordinary high water mark.¹

9. The water depth at the end of the pier is four feet, ten inches. The pier extends beyond the line of navigation. The Bartizals have not demonstrated a need for a pier extending beyond the line of navigation. No pierhead line has been established for the

¹The Department did not make an ordinary high watermark determination as part of its investigation of the application. From a review of photographs in the record, it is apparent that the point at which the platforms are connected to the uplands is above the ordinary high water mark; however, the record does not contain sufficient evidence to determine the precise location of the ordinary high watermark.

portion of the Fox River where the Bartizals' property is located.

10. The Department has no record of a permit having been issued for the above-described structure. The applicants introduced a copy of an application for a pier permit dated February 3, 1988 (exhibit 3); however, there is no reliable evidence in the record that this application was ever filed with the Department.² Even if the application was filed, the applicants concede that no written response to the application was received from the Department. Additionally, the proposed structure depicted on exhibit 3 does not accurately reflect the structure in place adjacent to the Bartizal property at the time of the Department's investigation. The diagram depicts a simple "L" shaped pier, extending to a water depth of three feet.

11. Based on the description in paragraph eight, the subject structure totals 1306 square feet in size (not including any boat hoists). The structure consumes approximately 3168 square feet of river bed which is no longer available for public use (the structure extends 66 feet into the river and is 48 feet wide, at its widest point). Based on the amount of public waterway which is consumed by this structure, the structure interferes with public rights in navigable waters.

12. The Department has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

A combined hearing was held for two matters involving the Bartizals. The first case, docket number 3-LM-92-786, involves an application of the Bartizals for a permit to construct a boat ramp and remove eight rocks on the bed of the Fox River. The issue in this case is whether the proposed projects will result in a material obstruction to navigation or be detrimental to the public interest. The finding on these issues is that construction of the boat ramp and removal of the eight rocks will not materially impair navigation or be detrimental to the public interest.

²Tom Radtke testified that he assumes the application was filed because the copy of the application found at the offices of Bob Radtke, Inc., has the box "WIS DNR" checked. Mr. Radtke testified that it is the practice of Bob Radtke, Inc., to check the boxes for the government agencies with which an application was filed; however, Mr. Radtke has no specific recollection that this application was ever filed with the Department. It should be noted that both on the application for the boat ramp (exhibit 2) and on the application attached to exhibit 24 which were filed by Bob Radtke, Inc., with the Department, the "Wis. DNR" boxes are not checked.

The second matter, docket number 3-LM-92-787, is an enforcement action involving an alleged unlawful construction and maintenance of a pier on the bed of the Fox River. The issue in this case is whether the subject pier has been unlawfully constructed and maintained. The parties do not dispute that there is no record of a permit being issued for the subject structure. The only issue which needs to be decided in this matter is whether a permit is required.

Because the pier structure interferes with public rights in the Fox River and because it extends beyond the line of navigation, a permit pursuant to sec. 30.12, Stats., is required for the structure. No permit has been applied for; therefore, no decision can be rendered on the issue of whether the structure is eligible for a permit. In other words, whether the existing structure constitutes a material obstruction to navigation or is detrimental to the public interest.

The Department, in its brief, asks the Division of Hearings and Appeals to condition a permit for the boat ramp on the applicants' reducing the size of the pier. This is not appropriate for at least two reasons. One reason is that the published notice for the hearing only informed the public that at issue were permits for the proposed boat ramp and proposed removal of eight rocks. The only reference to the pier was in the caption of the case.

The applicant, in its brief, noted that no member of the public appeared at the hearing objecting to the existing pier. The reason no members of the public appeared at the hearing may be that the public was unaware that the existing pier would also be a subject of the hearing. If the Bartizals wish to maintain the existing structure, they will need to apply for a permit for the structure and comply with requirements of Chapter 30, Stats., with regard to public notice and hearing on the application.

Another reason conditioning the permit for the boat ramp on a reduction in the size of the permit is inappropriate is that even if the Bartizals complied with the condition, they still would have an unpermitted pier. If Department policy regarding piers becomes more restrictive in the future, nothing would preclude the Department from commencing another enforcement action against the Bartizals for this pier.

The applicant argues that no permit is required for the existing pier structure. In support of this contention, the applicant raises two arguments. The first argument is that pursuant to sec. 30.13, Stats., no permit is required for the subject pier. It has already been discussed that this structure does not meet the conditions set forth at sec. 30.13(1), Stats. The fact that someone at Bob Radtke, Inc., prepared a permit application also contradicts the Bartizals' assertion that they believe no permit was required for the pier at the time it was constructed.

Additionally, even if it were shown that application was shown to someone from the

Department and that person advised Radtke that no permit was necessary for the proposed structure, this does not show that the Department's policy with respect to the requirements for pier permits has changed or has been applied inconsistently, because the application does not depict the pier actually constructed. The diagram accompanying the application is inaccurate with respect to size, shape, and water depth at the end of pier.

The second argument raised by the Bartizals is that the Department is trying to impose new regulations retroactively. This argument is not persuasive. The law has not changed since the Bartizals' pier was constructed. The guidelines drafted in 1991, did not change any part of the law relating to pier permits. The guidelines are merely an attempt to clarify public rights and interest in navigable waters and impose consistency throughout the state.

The Bartizals assert that the district "water management coordinator" of the Department in 1988 did not believe a permit was required for a pier of the size and configuration proposed by the Bartizals. The only evidence to support this assertion presented by the Bartizals is a letter dated May 1, 1987 addressed to a Tom Zillges with a copy sent to Bob Radtke, Inc. The letter states that a permit is not required for a pier of the type and size proposed (exhibit 24). The attached application indicates an "L" shaped pier. The base of the "L" is five feet by forty feet in size and the bar of the "L" is ten feet by forty feet. Even assuming this was the interpretation of the Department's Lake Michigan District, the Bartizals' pier is much more substantial than a simple "L" shaped pier.

The only aspects of the pier which I can comment on relate to the modifications which would be necessary to eliminate the requirement for a permit. This would involve bringing this pier into compliance with the conditions of sec. 30.13, Stats. Specifically, the length of the total structure must be reduced so that it does not extend beyond the line of navigation, the portions of the platforms³ which are constructed below the ordinary high water mark must be reduced in size, and the width of the outer "L" component of the pier must be reduced. This is not to say that a permit can not be issued for the Bartizals' pier as presently configured. The only finding is that this structure can not be maintained without a permit.

³The Bartizals argue that the three platforms together should be treated as a wharf. The presence of furniture on the platforms at the time of the initial site inspection by the Department supports the contention that, at least till that point in time, the platforms were used as a deck. Even if the Bartizals showed that the platforms are now used exclusively as a wharf, the structure does not meet the conditions set forth at sec. 30.13(1), Stats., because the excessive width of the platforms constitutes an interference with public rights especially when considered in conjunction with the size of the rest of the pier structure.

CONCLUSIONS OF LAW

1. The applicants are riparian owners within the meaning of sec.30.12, Stats.
2. The proposed boat ramp and existing pier described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.
3. The Division of Hearings and Appeals has authority under secs.30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue permits for the construction and maintenance of the proposed boat ramp and authorizing the removal of eight rocks on the bed of the Fox River subject to the conditions specified.
4. Pursuant to sec. 30.12, Stats. and sec. NR 326.05, Wis. Adm. Code, a permit is required for the existing pier. The pier was constructed and maintained without a permit. Accordingly, the construction and maintenance of the pier constitutes a violation of sec. 30.12, Stats., and; therefore, constitutes an unlawful obstruction pursuant to sec. 30.13(4)(a), Stats., and a public nuisance pursuant to sec. 30.294, Stats.
5. The proposed boat ramp is a type III action under §NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.
6. The proposed removal of eight rocks from the bed of the Fox River is a type IV action under §NR 150.03(8)(f)1.e, Wis. Adm. Code. Type IV actions do not require the preparation of a formal environmental impact assessment.

ORDER

Pursuant to the motion of the Department the pier structure constructed and maintained by the Bartizals is found to be a violation of sec. 30.12, Stats., and is declared an unlawful obstruction pursuant to sec. 30.13(4)(a), Stats., and a public nuisance pursuant to sec. 30.294, Stats. The pier shall be reduced in size so as to meet the conditions of sec. 30.13(1), Stats., within ninety days of the date of this order unless a permit pursuant to sec. 30.12(2), Stats., is issued for the structure.

PERMITS

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit pursuant to sec. 30.12, Stats., for the construction of the boat ramp as described in the application and Findings of Fact, subject; however, to the conditions that:

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1. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
2. This permit does not authorize any work other than what is specifically described.
3. The permittees shall notify the Department's district water management specialist not less than five working days before starting construction of the boat ramp and again not more than five days after the project has been completed.
4. No boats shall be stored on the boat ramp.
5. Acceptance of this permit shall be deemed acceptance of all conditions herein.
6. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
7. This permit shall expire three years from the date of this decision, if the project has not been completed by then.
8. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit pursuant to sec. 30.20(2)(c), Stats., to remove eight rocks from the bed of the Fox River as described in the application and Findings of Fact, subject; however, to the conditions that:

1. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
2. This permit does not authorize any work other than what is specifically described.
3. The permittees shall notify the Department's district water management specialist not less thirty days before removing any material from the bed of the Fox River and again not more than five days after the project has been completed.

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4. Acceptance of this permit shall be deemed acceptance of all conditions herein.

5. This permit shall expire three years from the date of this decision, if the project has not been completed by then.

6. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on July 19, 1996.

STATE OF WISCONSIN
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By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.